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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

BETWEEN:

ACC BANK PLC

Applicant

and

SEAN McCANN

Respondent

MASTER KELLY

INTRODUCTION.

[1] This judgment follows a hearing on 18th December 2012 whereby the Applicant seeks to annul or rescind a bankruptcy order made against the Respondent on 20th August 2012. This hearing occurred during the Long Vacation and prior to the petition's appointed hearing date of 7th September 2012. The petition was issued by Ms Fleur Jackson ("the Petitioner") for the sum of £1401.50.

[2] The Applicant, on foot of a judgment against the Respondent for €5.5m, had issued its own bankruptcy summons returnable for 21st August 2012 in the High Court in Dublin. The Applicant contends that the Northern Ireland bankruptcy order is a nullity due to procedural irregularity in or about the hearing of 20th August 2012. The Applicant further contends that as a creditor, it had the right to appear and oppose the petition on jurisdictional grounds; namely that the Centre of Main Interests ("COMI") of the Respondent is in the Republic of Ireland. The

Respondent however, claims that his COMI is Northern Ireland and that the High Court of Northern Ireland has jurisdiction in bankruptcy over him.

[3] Since 31 May 2002, the rules as to the bankruptcy jurisdiction of the Northern Irish Court are found in the jurisdictional provisions of Council Regulation (EC) No 1346/2000 on 29 May 2000. This is referred to hereafter as "the Regulation". For the purposes of the Regulation, the making of a bankruptcy order is the "opening" of proceedings in the relevant jurisdiction. If the proceedings opened in one Member State are defined as "main" proceedings then subject to Article 26(6) of the Regulation, only "territorial" or secondary proceedings may be opened in another Member State against the same person.

[4] The Applicant's application is grounded on the affidavit of Mr Michael Leogue, Manager in the Special Asset Management Division of the Bank. The Respondent filed an affidavit in reply. At the hearing of the application the Applicant was represented by its solicitor Mr Gordon and the Respondent was represented by Mr McEwen. Mr Gowdy of counsel appeared for the Official Receiver in order to give assistance to the court if required. The Official Receiver also filed an affidavit and exhibits which helpfully included the Respondent's Statement of Affairs and Preliminary Examination Questionnaire. These were of considerable assistance to the court. Although a Notice Party to the application, the Petitioner took no part.

1. BACKGROUND

[5] The Respondent is 55 years old, married with 3 children aged 9, 12 and 14. He says that he left the family home at Killegar Farm, Enniskerry, County Wicklow and moved his business and personal interests to Northern Ireland in or about November 2011. He says that this followed marital difficulties with his wife, Freda. At paragraph 6 of his affidavit he states, "We are not formally separated or seeking a divorce, but remain married for the sake of our young children." At paragraph 7 the Respondent says that he only returns home on agreed weekends or if one of his children is ill. However it is conceded by Mr McEwen, although it also appears in the Official Receiver's Preliminary Examination Questionnaire, that the Respondent returns home every weekend to the family home to see his children and spend the weekend there. The Respondent does not expand on the reason for his relocation to this jurisdiction within the context of his personal and business interests, and he discloses no obvious connection to the jurisdiction.

[6] At paragraph 6 of his affidavit the Respondent goes on to say that as part of his relocation, he entered a house-share arrangement with the Petitioner. He describes himself as a business consultant in the tourist industry and although he says he obtained a post-box at Botanic Avenue, Belfast for business service, his work is almost completely carried out by computer via email, Skype or phone and that he makes little use of postal service for communications. He exhibits to his affidavit

some correspondence with his bank and customers in order to demonstrate they were aware of his relocation. I will return to that later.

[7] Prior to November 2011, the Respondent appears to have been involved in property development in the Republic of Ireland and the liability to the Applicant in the sum of €5.5m arises from a loan facility and personal guarantee given by the Respondent in respect of his company. There is also a substantial liability to the Bank of Ireland in the sum of €1,031,600 on foot of a judgment mortgage against some 15 properties which the Respondent claims are worthless. AIB Bank is owed €332,000 also on foot of a company loan and personal guarantee. There is one other substantial creditor based in the US who is owed €242,000 or thereabouts. The Respondent's remaining creditors come to around €103,000 bringing his indebtedness in the Republic of Ireland to around €7.2m as compared to the petition debt of £1401.50 in Northern Ireland. The Respondent's assets are all located in the Republic of Ireland. Accordingly, the credibility of the Respondent is an important aspect of this case.

[8] As at 20th August 2012 when the bankruptcy order was made, the Applicant had a pending bankruptcy summons against the Respondent in the Republic of Ireland on foot of the aforementioned judgment. The summons was returnable for 21st August 2012. It is common case that the Applicant's judgment involves and arises from substantial litigation between the Applicant and the Respondent dating back to 2010. The Respondent is legally represented throughout those proceedings by PB Cunningham & Co, Solicitors in Dublin and counsel.

[9] Although the Respondent has appealed the Applicant's judgment to the Supreme Court in Dublin, it is not disputed that the Bankruptcy Court in Dublin granted liberty to the Applicant to issue a bankruptcy summons against the Respondent the appeal notwithstanding. Nor is it a matter of dispute that the court also granted leave for substituted service of the bankruptcy summons on the Respondent, or that on 10th August 2012 the High Court in Dublin deemed service good in respect of the summons. This included email and postal service on PB Cunningham, Solicitors in Dublin and the Insolvency Practitioner advising the Respondent in Northern Ireland, Mr Lismore. The Respondent was served by post at the Botanic Court address which was given to the Bank's Dublin solicitors by Mr Lismore.

[10] On 20th August the solicitor for the Petitioner forwarded an email application to the court requesting an urgent hearing that afternoon in light of the imminent hearing of the Applicant's bankruptcy summons. I had previously directed the disclosure of this email to the parties prior to the hearing of this application. It reads as follows:

> *"Dear Master Bell*
>
> *This matter is listed before the Bankruptcy Master on the 7th September 2012. The day after Mr McCann was served personally with the Bankruptcy Petition he was*

served with a Notice by a Court in the Republic of Ireland deeming that he could be served a Bankruptcy Petition by substituted service. That petition is listed for hearing tomorrow. Our client, Mrs Jackson , is anxious that the petition in Northern Ireland proceeds immediately so that Mr McCann will be subject to the jurisdiction of this Court and the Official Receiver. We understand that Mr McCann is amenable to the Petition being heard today and will attend Court to confirm his consent if the matter can be listed between 2 and 4 o'clock today. We would be grateful for your immediate response so that we can make arrangements for Mr McCann to be in attendance to confirm his agreement to the Order being made.

Yours faithfully,

Richard Barbour"

[11] Master Bell who was the Vacation Master for the day, agreed to hear the Petitioner's application at 3pm. A short ex-parte hearing took place at or about 3.00pm at which the Petitioner was not present but was represented by her solicitor. The Respondent appeared without representation. Following a short hearing a bankruptcy order was made at 3.10pm. The Applicant was notified of the bankruptcy order approximately a couple of hours later.

[12] It is important to review the timing of this hearing. As stated earlier, for the purposes of the Regulation, the making of a bankruptcy order is the "opening" of proceedings in the relevant jurisdiction. The Applicant's bankruptcy hearing on 21st August 2012 in the Republic of Ireland also claimed jurisdiction over the Respondent and sought to open main proceedings in that jurisdiction.

[13] In summary, the Northern Irish Bankruptcy Court has jurisdiction over a debtor in the following circumstances:-

(a) Where the centre of the debtor's main interests (COMI), as defined in the Regulation, is located in Northern Ireland and at least one of the domestic jurisdictional conditions set out in Article 239(1) of the Insolvency (NI) Order 1989 ("the Order") is met;

(b) Where the centre of a debtor's main interest is located in a member state other than the United Kingdom (apart from Denmark) but he possesses an establishment in Northern Ireland. If no main proceedings in another member state have been opened, certain other conditions must also be satisfied, and in any case at least one of the domestic jurisdictional conditions set out in Article 239(1) of the Order must be fulfilled.

[14] There are considerable advantages for the Respondent if he is able to persuade the Northern Irish Court that it has main insolvency jurisdiction over him within the meaning of the Regulation. If he were to be subject to the bankruptcy provisions of

the Republic of Ireland, then unless he could satisfy the conditions set out in Section 85 of the Bankruptcy Act 1988 (as amended), he would be subject to bankruptcy for a period of twelve years. This contrasts sharply with the position in this jurisdiction, where automatic discharge takes place one year after the commencement of the bankruptcy order, by virtue of the Insolvency (NI) Order 2005.

[15] The leading authority in Northern Ireland on the issue of COMI is that of *Irish Bank Resolution Corp Ltd v Quinn* [2012] NICh 1, and I will make considerable reference to that case in this judgment. In the case of *Quinn,* Deeny J stated at paragraphs [9] and [10] respectively:

> *"[9] The starting point for any consideration of the relevant legal principles must be Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings. This was a Regulation made by the Council of the European Union and binding on all Member States (except Denmark) but including the United Kingdom and Ireland.*
>
> *[10] I note that recital 4 of the preamble reads as follows:*
>
> > *"It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)."*

[16] On 21st August 2012 the hearing of the Applicant's bankruptcy summons proceeded notwithstanding the bankruptcy order made in this jurisdiction. A bankruptcy order was made in the High Court in Dublin against the Respondent by Ms Justice Elizabeth Dunne. The Respondent was represented at this hearing. In making the Order the High Court in Dublin exercised power to do so pursuant to Article 26(6) of the Insolvency Regulation EC 1346/2000 ("the Regulation") which provides that:

> "*any member state may refuse to recognise insolvency proceedings open in another member state or to enforce a judgement handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principle or the constitutional rights and liberties of the individual".*

2. THE ANNULMENT APPLICATION.

[17] The Applicant relies on two possible forms of relief open to the court in these circumstances, namely Articles 256(1)(a) and 371 of the Insolvency (Northern Ireland) Order 1989 ("the Order"). These state respectively:

> **256.—(1) The High Court may annul a bankruptcy order if it at any time appears to the Court—**

(a) that, on any grounds existing at the time the order was made, the order ought not to have been made.

371. The High Court may review, rescind or vary any order made by it in the exercise of the jurisdiction under this Order.

There was some initial debate at the hearing following an application from Mr McEwen to have the case transferred back to Master Bell. It was Mr McEwen's contention that as Master Bell made the bankruptcy order, only he could judge whether or not he would have dealt with the case differently in the light of the evidence in the Applicant's application. It was not he argued for one Master to review decisions made by another Master in the exercise of discretion. Mr Gordon, objecting to that application, contended that whilst the contentious issue of COMI was at the core of the case, the application itself arises from the procedure invoked by the Petitioner to obtain the bankruptcy order. He argued that the normal legal process was circumvented by procedural irregularity and that as a consequence, a bankruptcy order was made that is void. He contended that the bankruptcy court was the proper forum for the consideration of such issues.

[18] The factual matrix of this case is such that the bankruptcy order was made in circumstances which are undeniably irregular. The issue for the court to decide is whether the irregular circumstances of the hearing amounted to procedural irregularity for the purposes of the Order. The salient facts can be set out as follows:

(i) The petition was not heard on its appointed hearing date.
(ii) The hearing took place at the urgent request of the Petitioner without a formal application or evidence.
(iii) The petition was not heard in the Bankruptcy Court and did not appear on any court list or on the Court Service website.
(iv) No notice was given to the Applicant who had a concurrent bankruptcy summons in another Member State, of which both parties were aware.
(v) The imminent hearing of this summons is itself disclosed as the basis for the ex-parte hearing.
(vi) Master Bell's note, of which Mr McEwen claims to have had sight, states that he abridged the time for the hearing of the petition under the inherent jurisdiction of the court as opposed to the relevant provisions of the Insolvency Rules (Northern Ireland) 1991 ("the Rules") and thereafter the bankruptcy order was made.
(vii) The hearing lasted a matter of minutes.
(viii) The Petitioner did not appear but was legally represented.
(ix) The Respondent was unrepresented.

[19] The question of procedural irregularity within the context of a bankruptcy order principally attracts the provisions of Article 256(1)(a). However, given the wide application of Article 371, which applies to <u>all</u> orders including those made as a result of error, procedural irregularity and discretion, this issue could equally be considered under that provision. I am satisfied however that the issue of discretion,

insofar as it relates to the making of a bankruptcy order, has application only where no issue of procedural irregularity arises. If the Applicant's case was not founded on procedural irregularity I agree that there may, in other circumstances, have been merit to Mr McEwen's application. However as the issue of procedural irregularity is central to this application, whether the relief sought is under Article 256(1)(a) or Article 371 is immaterial. On this Mr McEwen did not demur. As to the bankruptcy court's jurisdiction to deal with this application, **The Supreme Court Practice, Volume 1, at paragraph 58/1/3** states**:**

> "*An appeal from the refusal of a Master to make an ex parte order lies to the judge in chambers. On the other hand, where the Master has granted an order ex parte, the proper course is not to appeal, but to apply to him or another Master to set aside such order*".

That being the case, I concluded that the bankruptcy court is the proper forum for the determination of this matter and that there is jurisdiction to do so. In the circumstances, the application to transfer the case back to Master Bell was therefore refused and the matter proceeded accordingly.

3. THE APPLICATION AND HEARING OF 20TH AUGUST 2012

[20] Although not expressly stated, Mr Barbour's email application sought two limbs of relief. The first was not in my view for abridgement of time, for reasons which I will come to in due course, but for an expedited hearing of the petition. The second was that if the first limb of relief was granted, that the said expedited hearing should take place immediately and not on some other date between 20th August 2012 and 7th September 2012 being the actual hearing date of the petition.

[21] Whilst the court undoubtedly has an inherent jurisdiction to control its own process and regulate its own rules and procedures, the key purpose of that is the administration of justice. Therefore the inherent jurisdiction of the court must be subject to any prevailing statutory rules applicable to the matter in question. Rule 6.017 of the Rules expressly deals with applications for the abridgement of time and expedited hearing of a bankruptcy petition. It states:

> Rule 6.017-(1) Subject to paragraph (2), the petition shall not be heard until at least 14 days have elapsed since it was served on the debtor.
> (2) The court may, on such terms as it thinks fit, hear the petition at an earlier date, if it appears that the debtor has absconded, or the court is satisfied that it is a proper case for an expedited hearing, or the debtor consents to a hearing within the 14 days.
> **(3) Any of the following may appear and be heard, that is to say, the petitioner, the debtor, the supervisor of any voluntary arrangement in force for the debtor and any creditor who has given notice under Rule 6.20.**
> {my emphasis}

Rule 6.017 (1) applies to the hearing date as endorsed on the petition. In simple terms, if the debtor has not been served with the petition at least 14 days before the hearing (in this case 7th September), the hearing cannot proceed unless the debtor consents to an abridgement of that time. As the Respondent had been served personally with the petition on 25th July 2012, the issue of abridgement of time had no application in this case.

As appears, Rule 6.017(2) gives the court discretion to hear the petition at an earlier date but only if it appears the debtor has absconded or it is satisfied that it is a proper case for an expedited hearing. There being no question of the Respondent having absconded, the only basis for the court hearing the application on 20th August 2012 was if satisfied that it was a proper case for an expedited hearing. In order to consider an application for an expedited hearing the court must have regard to the provisions of Rule 6.017 (3) above and Rule 6.020 which state:

> Rule 6.020-(1) **Every creditor who intends to appear on the hearing of the petition** shall give to the petitioner notice of his intention in accordance with this Rule.
> (2) The notice shall specify-
> (a) the name and address of the creditor giving it, and any telephone number and reference which may be required for communication with him or with any other person (to be also specified in the notice) authorised to speak or act on his behalf;
> **(b) whether his intention is to support or oppose the petition: and**
> (c) The amount and nature of his debt.
> (3) The notice shall be sent so as to reach the addressee not later than 16.00 hours on the business day before that which is appointed for the hearing (or, where the hearing has been adjourned, for the adjourned hearing).
> (4) A creditor failing to comply with this Rule may appear on the hearing of the petition only with the leave of the court.
> (Emphasis added).

Therefore any creditor who wishes to appear at the hearing of the petition to either support or oppose it is entitled to do so under the Rules by notice or with the leave of the court at the hearing.

[22] In light of the operation of these two Rules it is difficult to see how the expedited hearing of a petition can be justified except in circumstances where to do otherwise would prejudice the interests of the creditors as a whole. Indeed I am reminded of the statutory basis for the expedited presentation of a bankruptcy petition at Article 244 of the Order which states:

> **244.** In the case of a creditor's petition presented wholly or partly in respect of a debt which is the subject of a statutory demand under Article 242, the petition may be presented before the expiration of the period of 3 weeks mentioned in that Article if there is a serious possibility that the

debtor's property or the value of any of his property will be significantly diminished during that period and the petition contains a statement to that effect.

[23] The primary purpose of these statutory provisions is to protect the interests of the general body of creditors. In the absence of evidence of the debtor having absconded, or of serious risk to the assets of the debtor such as described above, the basis for the court being otherwise satisfied that a case warrants an expedited hearing is somewhat circumscribed. Moreover, the court could not give proper consideration to such a discrete application in the absence of evidence and a hearing. In this case it is not suggested that such a hearing took place. The only evidence before the court on the day was the content of the email which disclosed no basis for an expedited hearing other than jurisdictional preference. As far as the first limb of the application is concerned I am satisfied and conclude that it was misconceived *ab initio* and the rights of the Applicant and indeed all creditors under Rule 6.017 and 6.020, were prejudiced as a result.

[24] Even if, contrary to my finding, this were not the case, it is important to stress that certain fundamental matters must be established to the court's satisfaction at the hearing of a bankruptcy petition before the petition can be heard. The court must be satisfied as follows:

(a) That the proofs on service of the statutory demand and petition are in order and that the petition is properly before the court.
(b) That the Petitioner has locus standi to present the petition and that the petition debt can be verified.
(c) That the debtor is unable to pay the debt.
(d) That it has jurisdiction to make the order.

[25] The contentious bankruptcy order made on 20th August 2012 was made on foot of a petition issued by the Petitioner claiming the sum of £1401.50 for rent arrears. These rent arrears purport to be for the sub-letting of a property at 1 Botanic Court, Belfast during the period 11th November 2011 to 2nd July 2012. On 2nd July 2012 the Petitioner appears to have completed a handwritten statutory demand for that sum and served it herself some time that day. Her affidavit of service of the demand is somewhat incomplete and imperfect as it omits to specify the time or place of service. Exhibited to this affidavit is a copy email apparently from the Respondent (the sender's email identification does not appear) dated 2nd July 2012 acknowledging this service whereby it is stated:

"*Hi Fleur – I acknowledge receipt of your demand and I just want to say that I am genuinely sorry that it has come to this. As you know my personal circumstances are really difficult at the moment but I will do my best to ensure that you are not out of pocket at the end of the day.*

I know you want me to move out and I will move all my stuff out before you come from holidays.

I am sorry it has come to this.

Regards,

Sean"

[26] A bankruptcy petition was presented on 25th July 2012 by the Petitioner's solicitors Richard Barbour & Co and endorsed with a hearing date of 7th September 2012. Allowing for the Bank Holidays of 12th and 13th July, the petition was presented exactly 21 days after service of the statutory demand. This is the minimum period allowed under the Rules. Given that the Petitioner appears to have completed and served the statutory demand in person, this would tend to suggest that Mr Barbour only became involved at the petition stage. If that is correct he ought not to have completed the affidavit verifying the content of the petition, as the petition is founded on the content and service of the Statutory Demand. The affidavit verifying the petition should have been completed in these circumstances by the Petitioner.

[27] The debt which is the subject of the petition purports to arise from rent arrears on foot of a sub-letting arrangement with the Petitioner. The Petitioner however does not state the authority from which she derives her right to sub-let either on a residential or commercial basis, the latter important as the Respondent cites 1 Botanic Court, Belfast as a business address. If the sub-letting is unlawful, then the petition is likely to be invalid.

[28] Mr McEwen submitted that the agreement appended to the Respondent's affidavit, signed by both the Petitioner and the Respondent, is evidence of tenancy. Mr Gordon observed that this agreement refers to a "House Share Agreement", wherein the Petitioner is described as "Landlord" and the Respondent is described as "Tenant". He submitted that this agreement did not have the appearance of a lease such as one would expect, setting out in detail the legal/contractual rights and obligations of each party to the lease. In perusing the agreement I find that it is simple document containing 5 basic house-sharing rules, the last of which addresses the issue of disputes between the parties. It states:

"5. The parties hereto agree to attempt to settle any disputes between them on their own.

If the parties hereto are unable to reach an agreement with regard to **any dispute, Sean McCann will agree to leave within 30 days.**

The parties hereto agree that this agreement is subject to the laws and regulations of the state of the Private Tenancies (Northern Ireland) 2006. " (sic)

Emphasis added.

[29] Therefore if reliance is to be placed on this agreement there is nothing in it which gives rise to a right on the part of the Petitioner to bankrupt the Respondent in the event of an unresolved dispute, only to expect him to vacate the property. Bearing in mind the Respondent asserts he was also trading from this address, Mr McEwen was asked by the court if the Petitioner was the owner of the property. Upon taking instructions from the Respondent, Mr McEwen confirmed she was not. The court then asked Mr McEwen if the Respondent knew the identity of the owner/landlord of the property. This time, with no objection from Mr McEwen, the Respondent addressed the court directly. He said "I have no idea, absolutely no idea." He then proceeded to say that all his dealings were with the Petitioner whom he said was also from the Republic of Ireland and that he knew her and her partner Kieran Burke personally "from there". This means that the Petitioner and the Respondent were at the very least acquaintances, if not friends. This together with the matters outlined above leaves the petition debt open to doubt.

[30] Before proceeding further there is a significant feature of this case which should be highlighted. Aside from the incomplete affidavit of service of the statutory demand, there is no other evidence whatsoever from the Petitioner. The hearing on 20th August 2012 was apparently moved on her behalf but she neither attended nor provided any evidence to support it. This application, which was occasioned by that hearing, was served on the Petitioner as a Notice Party but she remained silent and absent throughout.

[31] Returning to the hearing of 20th August 2012 it is noteworthy that even if the Petitioner had properly succeeded in the first limb of her application, she expressed no interest in the Respondent's ability to discharge the debt. This is somewhat confounding given the modest size of the debt. Mr Gordon contended that the cost to the Petitioner in pursuing the petition was disproportionate to the debt. The Official Receiver's deposit alone is £700.00, a sum which is refundable to the Petitioner in the event of dismissal of the petition. Moreover, the issue of jurisdiction aside, the Petitioner still had to demonstrate, as did the Respondent, that there was an inability to discharge the debt. At the date of the hearing, and it is not a matter of dispute, the Respondent <u>was</u> in a position to discharge the debt. His affidavit for the purposes of the litigation with the Applicant in Dublin discloses a bank account in credit in Northern Ireland in the sum of approximately £1800. The Respondent's explanation for not discharging the debt when he had the ability to do so, is that he was advised that such a payment could constitute a preference in the event of bankruptcy. I find this explanation unconvincing, not least as the Respondent through Mr McEwen admitted he paid for a holiday with his wife and family in Europe in July/August 2012.

[32] As to the second limb of the Petitioner's application, the material fact insofar as relevant is that on 20th August 2012 there were two concurrent sets of bankruptcy

proceedings in two different Member States. Both claimed jurisdiction over the Respondent and both asserted their proceedings to be main proceedings for the purposes of the Regulation. Yet both could not be correct. In order to make a bankruptcy order that day, the court had to be satisfied for the purpose of the Regulation that it had jurisdiction to do so. This would have necessitated an evidential hearing on COMI including evidence from the Respondent himself. The Respondent in his affidavit advances the proposition that such a hearing on COMI took place before Master Bell. At paragraph 14 of his affidavit he states:

> "*I was present on the day on which the Petition was heard before Master Bell. I acknowledge that I am not a lawyer, and do not presume to be able to follow all of the legal technicalities, but I did follow the debate between the solicitor acting for the Petitioning Creditor and Master Bell, when he enquired into the COMI point. Master Bell did not simply accept whatever was set out in the papers in respect of COMI and questioned the Petitioning Creditor's solicitor at length.*"

[33] I have no reason to doubt that Mr Barbour responded to Master Bell's questions to the best of his knowledge but as Mr Barbour was the solicitor for the Petitioner, he could only address those questions from his client's limited perspective and his own instructions. He did not act for the Respondent. The Respondent was at all material times a personal litigant. Despite the Respondent's COMI being the live issue at the hearing, he describes himself more as a witness to the proceedings rather than a participant. In the recent case of *Swift 1st Limited –v-McCourt (*unreported- see *Neutral Citation No. [2012] NICh33)* Horner J noted at paragraph [4]:

"While, in the vast majority of cases, legal representatives appreciate that they owe a duty to the court to conduct themselves in accordance with long established rules of conduct it can be difficult to persuade personal litigants who have a personal interest in the outcome of the litigation, that they have obligations to the court that must outweigh what they perceive to be their own personal advantage."

In light of the two competing sets of bankruptcy proceedings I am satisfied that the court was on 20th August 2012 incapable of being satisfied that it had jurisdiction to make a bankruptcy order without hearing evidence from both sides, namely the Applicant and the Respondent.

4. CONSIDERATION AND DISCUSSION.

[34] For present purposes, the Respondent makes the case that the centre of his main economic interests is – or was when the petition was presented – located in Northern Ireland. There is no definition of COMI in the Regulation. However, paragraph 1(3) of the Recital to the Regulation states that:

> "the centre of a debtor's main interest should correspond to the place where the debtor conducts the administration of his interests on a regular basis, and is therefore ascertainable by third parties."

The Regulation was accompanied by a report of Manuel Virgos and Etienne Schmit dated 3rd May 1996 ("the Virgos-Schmit Report") and M Schmit's commentary at paragraph 75 states:

> "In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence".

Professor Virgos subsequently published with a Professor Garcimartin (Kluwer 2004) a text book which at paragraph 56(c) cited with approval in the *IBRC –v-Sean Quinn* case where at paragraph [20] it is stated:

> "For individuals, if the debtor is engaged in an independent business or professional activity, the centre of main interest will normally correspond to the State where he has his business or professional centre (ie. his "professional domicile"), provided that it is the business or professional activity that is at the root of the insolvency. In other cases is will be the individual's habitual residence."

At paragraph [22] the learned judge gave consideration to the case of Eurofood IFSC Limited C-341/04;[2006]Ch.508. The numbering applies to the relevant paragraphs in the Eurofood judgment:

> "33. That definition shows that the centre of main interest must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply."

> "41. It is inherent in that principle of mutual trust [between Member States] that the court of a Member State hearing an application for the opening of main insolvency proceedings check that it has jurisdiction having regard to Article 3(1) of the Regulation, i.e. examine whether the centre of the debtor's main interests is situated in that Member State. In that regard, it should be emphasised that such an examination must take place in such a way as to comply with the essential procedural guarantees required for a fair legal process (see paragraph 66 of this judgment)."

The learned Judge goes on to refer to the EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide, 2nd Edition, Oxford University Press 2009, edited by Mr Moss QC, Professor Fletcher and Mr Isaacs QC, where at paragraph 8.96 it is said:

> "The COMI of natural persons will generally be their place of habitual residence. In the case of 'professionals', however, it will be the place of the professional domicile. This suggests that the centre of main interests is linked to the type of activity from which the insolvency or need for rescue/reconstruction arises. Thus, where an individual is carrying on business activities and it is the business that is at the root of insolvency or need for rescue/restructuring, the centre of main interests may well be in the place of business rather than in the place of habitual residence (if different)."

At the date of presentation of the bankruptcy petition, the Respondent was self-employed and therefore engaged in an independent business. He also asserts that he was habitually resident in Northern Ireland. In this case therefore, there are two possible tests for COMI. The test of "professional domicile" and the test of "habitual residence".

Professional Domicile.

[35] The Respondent's evidence regarding the conduct of a business from the Botanic Court address is contradictory. On the one hand his affidavit refers to moving his personal and business interests to Northern Ireland in November 2011. On the other hand his Narrative Statement to the Official Receiver refers to the commencement of trading in his own name in November 2011:

> *" I began trading in my own name in November 2011. The nature of the business was consulting -> business process analysis/software. I was earning a reasonable living from this business. I am still currently trading in this business. I operate from home using my laptop."*

Moreover, in his Preliminary Examination Questionnaire, the Respondent states:

> "*I travel frequently within the Republic and within Northern Ireland. I work from home but need to attend meetings on a regular basis."* He goes on to say *" I earn my living as a consultant and provide services. I am also assisting the banks with regards to the sale of properties that are mortgaged to them".*

Thus the Respondent's affidavit infers that the Respondent moved his business interests in the Republic of Ireland to Northern Ireland and the Narrative Statement infers a wholly new business. There is no substantive evidence, either in his affidavit, Preliminary Examination Questionnaire or Narrative Statement to the Official Receiver, that the Respondent moved the business interests which give rise to his insolvency in the Republic of Ireland to Northern Ireland. For example, no financial records were produced, nor evidence of tax arrangements, banking arrangements, insurances, accountants or turnover. His main creditors, particularly those with whom he was involved in litigation, appear to have been unaware of any move of his Republic of Ireland business interests to Northern Ireland.

[36] Some limited correspondence from creditors was produced to support the Respondent's case that his creditors were aware that had moved his business interests to Northern Ireland. This correspondence, of which I must emphasise there is very little, is made up of correspondence which either pre-dates the petition or post-dates this application. The former, which includes a letter dated 16th April 2012 from AIB Bank in Dublin clearly refers to continuing business interests in the Republic of Ireland and a forthcoming meeting in Dublin to review the Respondent's business account. The latter are mostly computerised letters from various individuals for the purpose of the Respondent's replying affidavit and of little evidential value in an issue of such import.

[37] The Applicant contends it was only made aware of the Respondent's Belfast address on 25th July 2012 when its solicitors received a fax of that date from Mr Lismore. In that faxed letter Mr Lismore claims to be advising the Respondent in relation to his affairs. Prior to 25th July 2012, the only address the Applicant had for the Respondent was the address of the family home in Enniskerry. Mr Lismore's letter, which can only have been written on the instruction of the Respondent, accuses the Applicant of harassment and demands that such harassment cease. In response, the Applicant's solicitors say they were at the time attempting to serve documents on the Respondent at the family home in Enniskerry and point to the fact that this address also appeared as the Respondent's residential address in an affidavit sworn by him in July 2012, in the course of the ongoing litigation with the Applicant. Although both the Respondent and his solicitors attribute this to administrative error, the Respondent nevertheless concedes that he swore the affidavit and filed it in court in Dublin. The Applicant is therefore entitled to rely on it and the court can attach weight to it.

[38] The chronology of the proceedings and the nexus between the parties is impossible to ignore. It is to be noted that Mr Lismore's letter on behalf of his client was faxed at 12.12 on 25th July 2012 and further noted that the Petitioner's bankruptcy petition was issued by the court at 2.45pm that same day. By 4.05pm it had been served by a member of Mr Barbour's staff at 1 Botanic Court. It seems unlikely that these two events are coincidental especially as it appears from the affidavits that the both the offices of Mr Barbour and Mr Lismore are located in the same building.

[39] There is no persuasive evidence that, whatever business the Respondent is or was conducting in Northern Ireland at the date of presentation of the bankruptcy petition, it is at the root of his insolvency. If the test to be applied on COMI is that of "professional domicile" then in my view, the Respondent must demonstrate either that he moved the business interests which are at the root of his insolvency from the Republic of Ireland to Northern Ireland or, that it is other business interests in Northern Ireland which are at the root of his insolvency. Neither scenario is supported by the Respondent's evidence. There being no substantive evidence that the Respondent's business in Northern Ireland is at the root of insolvency, I conclude

that the Respondent doesn't meet the COMI test of professional domicile. That leaves the question of whether he meets the test of habitual residence.

Habitual Residence.

[40] It is contended by the Respondent that he moved to live in Northern Ireland in November 2011. The Respondent gives no reason for this. When viewed against the background of his continuing and regular involvement in his family life in Enniskerry, this is a significant omission. Further, his admission that he travels back to the family home every weekend to be with his family, itself weakens his argument for COMI in Northern Ireland on the basis of habitual residence. Not only is this an admission that for part of the week he resides in the family home with his wife and family, he refers to his children in his Preliminary Examination Questionnaire as dependent members of his household.

[41] There is no objective evidence that the Respondent actually lived at the house in Botanic Court and was therefore ascertainable to third parties. The Respondent attributes this to the fact that the property in Botanic Court is in an area populated by students and that he keeps to himself. This has echoes of the *Quinn* case where a similar argument was made by Mr Quinn. At paragraph [53] Deeny J stated:

> "If Mr Quinn, contrary to my finding, did operate the office at Unit 1, Derrylin Enterprise Park in the period leading up to the presentation of the petition I find that it was not sufficiently or reasonably ascertainable by third parties. He admits himself that initially he kept his profile at the office quite low and would have parked his car behind the office building and out of sight. He says he did so to maintain some privacy from the media or indeed the Bank "to avoid snooping into my family's affairs and also to provide a level of protection". He is perfectly entitled to take that approach but he cannot then claim that he has established an office at a centre of main interest which is ascertainable by third parties. The two positions are completely inconsistent."

In this case, the only objective evidence as to the Respondent's physical presence in Northern Ireland is at the key stages of the bankruptcy process.

[42] The burden of demonstrating that the centre of main interests lies within a particular jurisdiction falls upon the party so contending. In this it is for the Respondent to show that the Northern Irish Court has jurisdiction over him within the meaning of the Regulation. In *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974. Longmore LJ (at paragraphs 70-73) suggested (obiter) that the standard of proof may be that of a good arguable case. However, Sir Martin Nourse, at paragraph 75 of the judgment in *Shierson*, emphasised that the case had been argued throughout on the footing that the standard of proof to be applied was that of the balance of probabilities and not good arguable case. He went on to say that "*… it must be doubtful whether an English Court could apply the lower standard to the main insolvency*

proceedings without obtaining a ruling of the European Court of Justice to that effect". No such ruling has, hitherto, been sought.

[43] Having regard to the evidence before me, I have reached the conclusion that the evidence is that the Respondent has a very tenuous link to this jurisdiction, and has not met even the lower standard of proof as per *Shierson.* Therefore I am satisfied that he has not met the test for habitual residence. In the circumstances, having now found that the Respondent has not met either the test of professional domicile or habitual residence, I find therefore that the Respondent's COMI is not in Northern Ireland.

5. CONCLUSION.

[44] The Bankruptcy order in this case was made as a result of an ex-parte oral hearing at the apparent request of the Petitioner. In the particular circumstances of this case there is no statutory authority for such a hearing. To invoke the inherent jurisdiction of the court to overcome this impediment is contrary to the purpose of the inherent jurisdiction of the court which is to achieve the administration of justice and prevent abuse of process. No formal application or evidence was placed before the court. The court was not properly addressed on the law or the material facts as is required in an ex-parte hearing, or indeed at all. Stuart Sime's book "**A Practical approach to Civil Procedure (2nd Edition -1995)** states at **12.4.1**:

> "Any party making an *ex parte* application is under a duty to give full and frank disclosure of all material facts to the court. In the leading case of *R v Kensington Income Tax Commissioners, ex p Princess Edmund de Polignac* [1917] 1 KB 486, Warrington LJ said at p.509:
>
> > It is perfectly well settled that a person who makes an *ex parte* application to the court…is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him."

[45] The obligation to give full and frank disclosure of all material facts extends to the law relating to the particular application. When the court is asked to discharge an order made *ex parte* for non-disclosure it must look at the situation at the time the *ex parte* order was made. The judge in *National Commercial Bank v Haque* [1994] CLC 230 CA was held to have fallen into error in considering merely the evidence placed before the court on the *ex parte* application rather than the wider question of looking at the whole situation as at the time of the *ex parte* application. A fact is "material" if it is relevant to any of the matters to be considered in the application. The burden to satisfy the court on the issue of jurisdiction is a material fact.

[46] The legal framework exists to serve the administration of justice and it is important that it is applied robustly and equitably by the court. For the reasons set out above and elsewhere in this judgment, I find that the hearing of 20th August 2012 was procedurally irregular and ought not to have taken place. This is for two reasons. Firstly, the Petitioner's application did not meet the statutory criteria for an expedited hearing. Secondly, the court did not have jurisdiction to make the order without a hearing and full evidence from all parties with notice to the Applicant. The bankruptcy order must therefore be annulled and I hereby do so pursuant to the provisions of Article 256(1)(a) of the Insolvency (Northern Ireland) Order 1989.